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UNITED STATES DISTRICT COURT
4
DISTRICT OF NEVADA
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6 _____)
7 GOLDEN PHOENIX MINERALS, INC.,)
8 Petitioner,)
9 vs.)
10 PINNACLE MINERALS, INC.,)
11 Respondent.)
12 _____)

3:15-cv-00521-RCJ-WGC

ORDER

13 This case arises out of the arbitration of a dispute over one or more promissory notes.

14 Pending before the Court is a Motion to Dismiss Counterclaims (ECF No. 19). For the reasons
15 given herein, the Court grants the motion.

16 **I. FACTS AND PROCEDURAL HISTORY**

17 In 2013, Respondent Pinnacle Minerals, Inc. sued Petitioner Golden Phoenix Minerals,
18 Inc. in this District on two promissory notes. That case, No. 2:13-cv-915, was assigned to the
19 Hon. Miranda Du. Before any answer or motion for summary judgment was filed, Respondent
20 voluntarily dismissed as of right because the parties had agreed to arbitrate the claims. Petitioner
21 filed the present case in state court in July 2015, seeking confirmation of the arbitration award of
22 \$573,469 in its favor under Nevada Revised Statutes section (“NRS”) 38.239 and the Federal
23 Arbitration Act (“FAA”). (*See* Pet. ¶¶ 1–28, ECF No. 1-3). Respondent removed and moved to
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1 vacate the award and to stay the case pending the arbitrator's resolution of a motion for
2 reconsideration. The Court granted the motion to stay and denied the motion to vacate, without
3 prejudice. In the meantime, Respondent answered and filed counterclaims for declaratory
4 judgment and wrongful garnishment. Petitioner has moved to dismiss the counterclaims.

5 **II. LEGAL STANDARDS**

6 Federal Rule of Civil Procedure 8(a)(2) requires only "a short and plain statement of the
7 claim showing that the pleader is entitled to relief" in order to "give the defendant fair notice of
8 what the . . . claim is and the grounds upon which it rests." *Conley v. Gibson*, 355 U.S. 41, 47
9 (1957). Federal Rule of Civil Procedure 12(b)(6) mandates that a court dismiss a cause of action
10 that fails to state a claim upon which relief can be granted. A motion to dismiss under Rule
11 12(b)(6) tests the complaint's sufficiency. *See N. Star Int'l v. Ariz. Corp. Comm'n*, 720
12 F.2d 578, 581 (9th Cir. 1983). When considering a motion to dismiss under Rule 12(b)(6) for
13 failure to state a claim, dismissal is appropriate only when the complaint does not give the
14 defendant fair notice of a legally cognizable claim and the grounds on which it rests. *See Bell*
15 *Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). In considering whether the complaint is
16 sufficient to state a claim, the court will take all material allegations as true and construe them in
17 the light most favorable to the plaintiff. *See NL Indus., Inc. v. Kaplan*, 792 F.2d 896, 898 (9th
18 Cir. 1986). The court, however, is not required to accept as true allegations that are merely
19 conclusory, unwarranted deductions of fact, or unreasonable inferences. *See Sprewell v. Golden*
20 *State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001).

21 A formulaic recitation of a cause of action with conclusory allegations is not sufficient; a
22 plaintiff must plead facts pertaining to his own case making a violation "plausible," not just
23 "possible." *Ashcroft v. Iqbal*, 556 U.S. 662, 677–79 (2009) (citing *Twombly*, 550 U.S. at 556)

1 (“A claim has facial plausibility when the plaintiff pleads factual content that allows the court to
2 draw the reasonable inference that the defendant is liable for the misconduct alleged.”). That is,
3 under the modern interpretation of Rule 8(a), a plaintiff must not only specify or imply a
4 cognizable legal theory (*Conley* review), but also must allege the facts of his case so that the
5 court can determine whether the plaintiff has any basis for relief under the legal theory he has
6 specified or implied, assuming the facts are as he alleges (*Twombly-Iqbal* review). Put
7 differently, *Conley* only required a plaintiff to identify a major premise (a legal theory) and
8 conclude liability thereunder, but *Twombly-Iqbal* requires a plaintiff additionally to allege minor
9 premises (facts of the plaintiff’s case) such that the syllogism showing liability is logically
10 complete and that liability necessarily, not only possibly, follows.

11 “Generally, a district court may not consider any material beyond the pleadings in ruling
12 on a Rule 12(b)(6) motion. However, material which is properly submitted as part of the
13 complaint may be considered on a motion to dismiss.” *Hal Roach Studios, Inc. v. Richard Feiner*
14 & Co.

15 , 896 F.2d 1542, 1555 n.19 (9th Cir. 1990) (citation omitted). Similarly, “documents
16 whose contents are alleged in a complaint and whose authenticity no party questions, but which
17 are not physically attached to the pleading, may be considered in ruling on a Rule 12(b)(6)
18 motion to dismiss” without converting the motion to dismiss into a motion for summary
19 judgment. *Branch v. Tunnell*, 14 F.3d 449, 454 (9th Cir. 1994). Moreover, under Federal Rule
20 of Evidence 201, a court may take judicial notice of “matters of public record.” *Mack v. S. Bay*
21 *Beer Distrib., Inc.*, 798 F.2d 1279, 1282 (9th Cir. 1986). Otherwise, if the district court
22 considers materials outside of the pleadings, the motion to dismiss is converted into a motion for
23 summary judgment. See *Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 925 (9th Cir.
24 2001).

1 **III. ANALYSIS**

2 Petitioner argues that the counterclaims are procedurally improper under both Chapter 38
3 of the NRS and the FAA. To the extent the FAA provides procedural rules inconsistent with the
4 Federal Rules of Civil Procedure, the FAA controls. *See Fed. R. Civ. P. 81(a)(6)(B)*. Petitioner
5 notes that the Eleventh Circuit has ruled that only defenses enumerated in §§ 10 and 11 of the
6 FAA may be brought as counterclaims in actions to confirm arbitration awards. *See Booth v.*
7 *Hume Publishing, Inc.*, 902 F.2d 925, 931 (11th Cir. 1990) (“In other words, Rule 13 of the
8 Federal Rules applies to a § 9 motion to confirm an arbitration award only to the extent the Rule
9 is consistent with the language and purpose of the Arbitration Act. We conclude that it would be
10 inconsistent with the language and purpose of the Arbitration Act to allow counterclaims under
11 Rule 13, other than counterclaims that fall within the specific defenses permitted under §§ 10 and
12 11 of the Arbitration Act.” (footnote omitted)). The Court of Appeals cited *Booth* in approval in
13 a pre-2007 unpublished case. The Court agrees with these authorities.

14 The grounds for vacating or modifying an arbitration award are corruption, fraud, undue
15 means, partiality, misconduct, exceeding powers, miscalculation or misidentification, rulings on
16 matters not submitted, or errors in the form of the award. *See 9 U.S.C. §§ 9, 10*. Moreover, the
17 only remedies are modification of or vacation of the award. The first counterclaim is a for a
18 declaration that the arbitrator may not order the use the \$190,000 Respondent deposited into its
19 attorney’s trust account (as a bond at the order of the arbitrator) in order to satisfy the arbitration
20 award in favor of Petitioner, but that Petitioner must use the statutory garnishment procedure
21 under Chapter 33 of the NRS to reach those funds. The second counterclaim is for wrongful
22 garnishment under NRS 31.030. The only basis for a counterclaim under §§ 10 or 11 implied in
23 the Counterclaim here is that the arbitrator exceeded his powers under 9 U.S.C. § 10(a)(4);
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1 specifically, that he did not have the power to order that Respondent's bond meant to secure
2 wrongful garnishment be used to pay Petitioner's own award without requiring Petitioner to
3 garnish the bond itself under state law.

4 Respondent was the claimant in the arbitration. Because Respondent believed Petitioner
5 to be insolvent, it sought a prejudgment writ of garnishment from the arbitrator in the amount of
6 \$190,000 (the outstanding balance on the debt it claimed it was owed). (Countercl. ¶ 7, ECF No.
7 17). In an April 11, 2014 order, the arbitrator ordered that Petitioner place that amount of money
8 into a trust account with its attorney "to satisfy any judgment [Respondent] may obtain . . ."
9 (Id.). Because Nevada law required Respondent to post a bond to cover damages from the
10 potential wrongfulness of the attachment were Petitioner to prevail, the order also required
11 Respondent to deposit \$190,000 in its own attorney's trust account to cover "damages
12 [Petitioner] may sustain by reason of wrongful attachment or in the event [Respondent] does not
13 prevail on its claims." That language indicates that Respondent's bond could be used not only to
14 cover damages for wrongful attachment of Petitioner's own money but also to cover damages
15 awarded to Petitioner ("or in the event [Respondent] does not prevail on its claims.").
16 Respondent argues that the arbitrator did not have the authority to so order without making
17 Petitioner conduct a separate garnishment based on its eventual award.

18 The Court grants the motion to dismiss. The Court need not reach the propriety under
19 state law of the arbitrator's action in ordering that the bond be garnished, because the
20 counterclaims simply do not seek vacation or modification of the award itself. Indeed, in its
21 opposition, Respondent admits (with emphasized text) that its counterclaims do not seek to
22 challenge any arbitration award but only the arbitrator's post-judgment actions. That is not to
23 say that Respondent has no remedy. Respondent may be able to sue Petitioner and/or the
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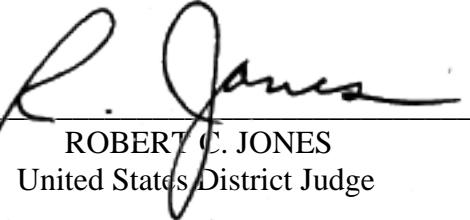
1 arbitrator in state court for wrongful garnishment. Just as one who suffers a breach of a
2 settlement agreement may not ask the court before which the original action was pending for a
3 remedy but must usually file a separate action for breach of contract, Respondent here may not
4 ask this Court to remedy an alleged post-judgment wrong not affecting the merits of the
5 arbitration award but must bring a separate action for wrongful garnishment. This Court cannot
6 consider those claims as counterclaims in an FAA suit to confirm an arbitration award.

7 **CONCLUSION**

8 IT IS HEREBY ORDERED that the Motion to Dismiss Counterclaims (ECF No. 19) is
9 GRANTED.

10 IT IS SO ORDERED.

11 DATED this 25th day of January, 2016.

12 
13 ROBERT C. JONES
14 United States District Judge